

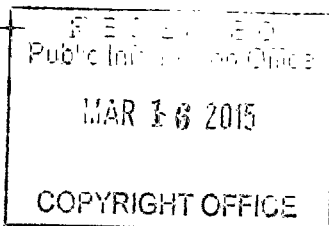
BEFORE THE  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
LIBRARY OF CONGRESS  
WASHINGTON, D.C.

*In re*

DETERMINATION OF ROYALTY  
RATES AND TERMS FOR  
EPHEMERAL RECORDING AND  
DIGITAL PERFORMANCE OF SOUND  
RECORDINGS (*WEB IV*)

DOCKET NO. 14-CRB-0001-WR  
(2016-2020)

SOUNDEXCHANGE'S OPPOSITION TO LICENSEE SERVICES' MOTION TO  
STRIKE SOUNDEXCHANGE'S CORRECTED WRITTEN REBUTTAL TESTIMONY  
OF DANIEL RUBINFELD AND SECTION III.E OF THE WRITTEN REBUTTAL  
TESTIMONY OF DANIEL RUBINFELD



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## INTRODUCTION

The white-hot rhetoric of the Services' Motion cannot obscure what is actually going on here, and why the Services are so desperate to strike Dr. Rubinfeld's analysis of Apple's licenses with Warner and Sony for Apple's iTunes Radio service discussed in Appendix 2 of the rebuttal testimony of Dr. Rubinfeld (collectively, the "Apple Warner/Sony Licenses") and the licenses for other non-interactive, non-subscription services discussed in Section III.E of the rebuttal testimony (Beats Music's "The Sentence," Spotify's free tier, Rhapsody's unRadio, and Nokia MixRadio, collectively, the "Section III.E Licenses"). Dr. Rubinfeld's analysis of these licenses critically undermines the Services' case and their proposed benchmarks. None of the Services' arguments for suppressing these highly probative licenses—which the Services themselves described as being of "fundamental importance to the rate-setting process" *before* they saw their terms—has merit.

*First*, Dr. Rubinfeld's testimony is plainly proper rebuttal testimony under the Judges' prior authority. The testimony the Services seek to strike from Dr. Rubinfeld's rebuttal testimony concerning the Apple Warner/Sony Licenses and the Section III.E Licenses is directly, indeed, crucially responsive to the heart of the Services' direct case—it refutes the Services' critiques of the interactive services benchmarks and demonstrates that their own non-interactive benchmarks are based on unrepresentative licenses. It falls well within the scope of the Judges' prior rulings, which establish that to constitute rebuttal, there need only be a "nexus" between the proffered testimony and the issues, subject matter, or shortcomings in an opponent's direct case. The fact that rebuttal testimony that has such a "nexus" also "bolsters" or augments the submitting party's own direct case does not change this rule. And this rule holds even if the evidence introduced on rebuttal was in the submitting party's possession when it submitted its direct case.

Dr. Rubinfeld's testimony tests and proves false the Services' critique of the interactive benchmark as purportedly reflecting inflated, supra-competitive prices that exceed the rates that

a willing buyer/willing seller would agree to for non-interactive services. The Services contend that, because of the alleged “must-have” nature of the major labels’ catalogs, the licensing market for interactive services is not “workably” or “effectively” competitive, and, therefore, rates derived from that market are above “competitive” levels. They also claim that because the subscription-based models of interactive services generate higher average revenues per user (“ARPU”) than ad-supported, non-interactive services, any rates premised on interactive benchmarks are likewise too high. As NAB’s expert, Dr. Michael Katz, testifies, “interactive license fees will be higher than those that would obtain under conditions of effective competition” in the licensing market for non-interactive services. Katz WDT at 42.

But as Dr. Rubinfeld demonstrates, the negotiated rates for the non-interactive, non-subscription services in the Apple Warner/Sony Licenses, and the Section III.E Licenses, [REDACTED] Dr. Rubinfeld’s proposed rates in his direct testimony based on the interactive benchmarks. That the Services’ experts chose not to test their theories against *all* relevant market evidence highlights the shortcomings of their analysis and the fact that their rate proposals are based on an unrepresentative group of purported benchmarks. Dr. Rubinfeld’s testimony plainly falls within the realm of proper rebuttal testimony.

*Second*, SoundExchange submitted the testimony at issue in a timely manner, and the Services’ claims of prejudice ring hollow. The Services state that SoundExchange’s reasonable conduct “reeks of gamesmanship”; that it has caused “manifest” prejudice; and that the Services were “sandbagged,” because SoundExchange’s direct case filings supposedly precluded the Services from addressing these licenses in their rebuttal filings. Mot. at 3, 13-14, 21. None of this is true. Nothing about the nature of SoundExchange’s direct filing or the timing of the Services’ receipt of the licenses precluded the Services from including Apple’s licenses with Universal, Warner, and Sony for Apple’s iTunes Radio service (collective, the “Apple Majors Licenses”) in their rebuttal filing. The real explanation, of course, is that the Services *did* analyze the Apple Majors Licenses, they did not like the benchmark evidence from these licenses, and they made a tactical decision to try to keep that relevant evidence out of the

proceedings by capitalizing on the restrictions that the Services say Apple negotiated in those licenses. Mot. at 5.

The Services' lawyers and experts in fact were able to review the Apple Majors Licenses and Section III.E Licenses when they were produced on November 14, 2014, more than *three months* before they had to file their rebuttal case. Declaration of Anjan Choudhury ("Choudhury Decl.") ¶ 4. And the Services had more than just those licenses. The Services received in discovery documents relating directly to these licenses, including internal summary documents, financial reporting and performance data, and valuation documents. SoundExchange itself signaled in its direct case the importance of the Apple Majors Licenses to this proceeding. Yet having seen these licenses, the Services chose not to ask Dr. Rubinfeld, or any other SoundExchange witnesses they deposed before rebuttal (including witnesses from Sony and Universal) any questions about them. The Services also chose not to amend their direct testimony to incorporate the Apple Majors Licenses and the Section III.E Licenses or to address them in rebuttal, despite having had ample opportunity to analyze their terms. As the Judges previously noted, participants "may seek in discovery potential benchmark contract information that opposing" participants "possessed but chose not to include in [their] own benchmark analysis," and they "would have sufficient time to incorporate and utilize the new information and documents in their respective rebuttal cases." *Order Denying, Without Prejudice, Motions for Issuance of Subpoenas Filed By Pandora Media, Inc. and the National Association of Broadcasters* ("Order Denying Subpoena Motion") 4-5, Docket No. 14-CRB-0001 WR (April 3, 2014). It was the Services' choice not to do so.

Unlike the Services, SoundExchange [REDACTED]

[REDACTED] Those restrictions, which SoundExchange played no part in negotiating, put SoundExchange at an extreme disadvantage relative to the Services.

SoundExchange could not know whether the Services would rely on the terms of the Apple Majors Licenses— [REDACTED]

\_\_\_\_\_—until the Services filed their rebuttal.

SoundExchange therefore followed a prudent and reasonable course: in its February 23 submission, it provisionally redacted Dr. Rubinfeld's rebuttal testimony analyzing the Apple Majors Licenses until it knew whether the Services' rebuttal case had \_\_\_\_\_

\_\_\_\_\_ After reviewing the Services' hundreds of pages of rebuttal testimony, and confirming that the Services had, in fact, relied on the terms of Apple's license with Warner, SoundExchange submitted a corrected, unredacted version of the testimony promptly—less than 48 hours after the original submission—which analyzes the Apple Warner/Sony Licenses. That triggering event with respect to the Apple Warner/Sony Licenses happened when iHeartMedia's expert, Dr. Kendall, relied upon not the "negotiation" of \_\_\_\_\_. Indeed, the fact that the Services' rebuttal testimony selectively relied upon one of the Apple Majors Licenses shows that the Services *did* review them and the related documents. Upon discovering that Dr. Kendall relied upon Apple's license with Warner, Warner and Sony promptly advised SoundExchange that it could unredact the discussion in Appendix 2 of Dr. Rubinfeld's rebuttal testimony related to the Apple Warner/Sony Licenses.

The Services' claim that Dr. Rubinfeld's testimony regarding the Apple Warner/Sony Licenses is actually a "sur-rebuttal" because it was "motivated" by certain statements in the Services' rebuttal case that rely upon terms of the Apple Majors Licenses (Mot. at 14) is wrong. It confuses the statements in the Services' rebuttal case that \_\_\_\_\_ thereby permitting Warner and Sony to submit them to the Judges, and the Services' direct testimony that Dr. Rubinfeld is substantively responding to in his discussion and analysis of the Apple Warner/Sony Licenses. And indeed, it would have been chronologically impossible for Dr. Rubinfeld's rebuttal testimony to be "motivated" by statements he had not even seen until after their submission. Moreover, to obviate any claim of prejudice—which itself would be implausible, given the many months the Services had to analyze the licenses—SoundExchange told the Services that it

would not object to document requests and interrogatories relating to the Apple Warner/Sony Licenses being served two days beyond the deadline for serving such requests. And, in fact, iHeartMedia served the Services' remaining document requests—directed to the Apple Warner/Sony Licenses—two days after the otherwise applicable deadline. The Services also served an interrogatory directed specifically at the Apple Warner/Sony Licenses, and they have noticed another deposition of Dr. Rubinfeld, where they are free to ask him questions about his analysis of these licenses.

*Finally*, even if Dr. Rubinfeld's testimony somehow were procedurally improper, which it is not, the Judges should exercise their broad discretion to admit it given that the Apple Warner/Sony Licenses and the Section III.E Licenses are critical, indeed, essential marketplace evidence for the Judges to consider. The Judges do not have to take SoundExchange's word for it. Prior to receiving the Apple Majors Licenses and seeing what the rates in them actually were, the Services *themselves* said in their subpoena motions that these licenses were of "fundamental importance to the rate-setting process," and that their "centrality" to that process was "self-evident." Choudhury Decl., Ex. 1 (Pandora Subpoena Motion 3), Ex. 5 (NAB Reply ISO Subpoena Motion 2). Indeed, NAB emphasized that, because of "Apple's prominence and size," review and analysis of the Apple Majors Licenses would "foster[] *a fairer and more balanced evidentiary record.*" *Id.*, Ex. 4 (NAB Subpoena Motion 9) (emphasis added). And in denying these motions without prejudice, the Judges themselves recognized "that the information sought by Pandora and NAB could be central to the resolution of this proceeding." *Order Denying Subpoena Motions* 5.

For these reasons, and those described further below, the Services' Motion should be denied.

### **BACKGROUND**

The Services' Motion concerns two categories of testimony, both from the written rebuttal testimony of Dr. Daniel Rubinfeld, an economist who will appear at the unified hearing



on behalf of SoundExchange next month. The first category is rebuttal testimony from Dr. Rubinfeld analyzing the Apple Warner/Sony Licenses. That testimony was submitted in redacted form on February 23, and was corrected to remove redactions on February 25. The second category is rebuttal testimony from Dr. Rubinfeld, submitted on February 23, concerning the Section III.E Licenses—licenses between record companies and Beats Music, Spotify, Rhapsody, and Nokia for non-interactive, non-subscription services that were included in Dr. Rubinfeld’s robust direct case analysis. *See, e.g., Rubinfeld WDT, Appendix 1a & p. 57* (analyzing overall Beats Music, Spotify, Rhapsody, and Nokia licenses).

The record conclusively proves that the Services sought and received information about both categories of testimony; that the testimony rebuts the Services’ direct case; that the Services themselves recognized the importance of the licenses that they now seek to exclude from these proceedings; and that the Services had the information about these licenses necessary to prepare their rebuttal case months before their filings were due.

**I. More Than a Year Ago, the Services Sought Subpoenas for These Licenses Because of Their “Fundamental Importance” to This Proceeding**

On March 10, 2014, Pandora moved for issuance of subpoenas seeking information related to licenses between record companies and a number of digital music services including, specifically, Beats Music, Rhapsody, and Spotify.<sup>1</sup> *See Choudhury Decl. Ex. 1* (Pandora Subpoena Motion 9, Ex. A, Ex. C, Ex. D). Two days later, NAB filed a consolidated joinder in Pandora’s motion. *See Choudhury Decl. Ex. 4* (NAB Subpoena Motion, Ex. A).<sup>2</sup> NAB’s Motion also included subpoenas to Universal, Warner, and Sony that requested any agreement and related information between those record companies and any “Webcasting Service,” which

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<sup>1</sup> Pandora specifically referred to these three services in discussing the importance of on-demand licenses. Choudhury Decl. Ex. 1 (Pandora Subpoena Motion 9); *see also* Choudhury Decl. Ex. 2 (Rich Decl. to Pandora Subpoena Motion ¶ 18 (pointing to Rhapsody and Spotify)).

<sup>2</sup> At the time, counsel for Pandora could not act adversely to Apple, necessitating the submission from NAB. Choudhury Decl. Ex. 3 (Larson Decl. to Pandora Subpoena Motion ¶ 2).

NAB defined to include “services engaged in non-interactive streaming and services engaged in interactive or ‘on demand’ streaming.” *See* Choudhury Decl. Ex. 4 (NAB Subpoena Motion, Exs. B, C, D). These requests encompassed the Apple Majors Licenses and the Section III.E Licenses.

The Services stressed the importance of these licenses to this proceeding. Pandora, for instance, noted that these licenses comprise “a significant portion of the very marketplace evidence on which the parties will join issue in these proceedings” because of their “fundamental importance to the rate-setting process.” Choudhury Decl. Ex. 1 (Pandora Subpoena Motion 3). Pandora and NAB both relied extensively on a sworn declaration of Pandora’s counsel, Bruce Rich, who stated that Pandora would be “unable meaningfully” to consider “the[] complex matters” of this “consequential proceeding” without “the benefit of basic marketplace information reflecting agreements between the record industry and digital music services,” referring, of course, to the information sought by Pandora and NAB in its motion. Choudhury Decl. Ex. 2 (Rich Decl. to Pandora Subpoena Motion ¶ 6).

Pointing specifically to the Apple Majors Licenses, NAB attached articles about how Apple was taking “aim at Pandora” with iTunes Radio. Choudhury Decl. Ex. 4 (NAB Subpoena Motion Ex. E). NAB observed that “[g]iven Apple’s prominence and size, the services (including their economic experts) should have the opportunity to review such agreements and address them in their affirmative cases . . . . *By permitting such access, the Judges will be able to obtain economic analyses of those agreements from both the buyers and sellers in the marketplace, thus fostering a fairer and more balanced evidentiary record.*” *Id.* at 9 (emphasis added). Choudhury Decl. Ex. 5 (NAB Reply ISO Subpoena Motion 2).

The Services emphasized the risk that parties might cherry-pick agreements to submit to the Judges. Pandora, for instance, said that, absent analysis of a wide range of marketplace agreements, a party might “present a selective analysis that reflects only the data favorable to it.” Choudhury Decl. Ex. 1 (Pandora Subpoena Motion 5). Pandora said it was concerned that parties might “make judgments as to those [licenses] that optimize its case . . . while effectively

‘burying’ the rest.” Choudhury Decl. Ex. 1 (Pandora Subpoena Motion 13). NAB said that, “[b]y definition, such a one-sided evidentiary record will not approach the ‘optimal economic analysis’ that the Judges seek and thus will significantly impair the Judges’ ability to determine the rates that would prevail in an effectively competitive market, which is their congressionally assigned task.” Choudhury Decl. Ex. 4 (NAB Subpoena Motion 5).

The Judges denied the Subpoena Motions without prejudice. In doing so, the Judges emphasized “[t]he importance to the Judges of receiving evidence of a ‘thick market’ (*i.e.*, as much contract information as exists)” and “that the information sought by Pandora and NAB could be central to the resolution of this proceeding.” *Order Denying Subpoena Motions* 5. Though acknowledging the possibility that this information “may not be introduced in evidence and utilized sufficiently by the participants,” the Judges denied the motion at the time because the information could still be obtained by the Services pursuant to other means—*i.e.*, through discovery in this proceeding. *Id.*

Given the Services’ concerns (at the time) that rebuttal testimony would be narrowly circumscribed, the Judges also addressed the proper scope of rebuttal. The Judges noted that, through discovery, the Services “might have the information available for use by their witnesses and for inclusion in their rebuttal cases.” *Order Denying Subpoena Motion* 6. “If a participant receives information and documents during the discovery period, or even shortly thereafter in response to an order compelling discovery or a subpoena, the moving participants would have sufficient time to incorporate and utilize the new information and documents in their respective rebuttal cases . . . .” *Id.*

## **II. SoundExchange Addressed the Apple Majors Licenses and Section III.E Licenses In Its Direct Case**

Following the Judges’ call for a “thick market” analysis, SoundExchange submitted a robust written direct case that included an analysis of hundreds of voluntary licenses, including the Section III.E Licenses with Beats Music, Spotify, Rhapsody, and Nokia. Dr. Rubinfeld included the Section III.E Licenses in the benchmark analysis in his written direct testimony; he

provided specific computations for each Section III.E service; and he also discussed these services throughout his report.<sup>3</sup>

With respect to the Apple Majors Licenses, contractual provisions [REDACTED]

[REDACTED] ]. Choudhury Decl. Ex. 6 [REDACTED] Ex. 7

[REDACTED] SoundExchange therefore explained in its Introductory Memorandum that it

intended to submit information relating to the major record labels' agreements with Apple for its iTunes Radio service as part of its Written Direct Testimony. The record companies asked Apple to waive certain contractual provisions in these agreements that limit or prohibit the submission or reliance upon them in connection with this proceeding. Apple refused to do so. Accordingly, SoundExchange has not submitted information relating to these agreements for the Judges' consideration.

Introductory Memorandum to the Written Direct Statement of SoundExchange, Inc., 3 n.1 (October 7, 2014). Dr. Rubinfeld similarly noted in his testimony that he was planning to consider Apple but did not include information in his report because of contractual provisions that limit or prohibit the submission or reliance of those licenses. Corrected Written Direct Testimony of Daniel Rubinfeld ¶ 17 (filed November 4, 2014).

### **III. The Services Requested and Received Extensive Information About the Apple Majors Licenses and the Section III.E Licenses in Discovery**

As expected, the Services sought discovery that included requests related to the Apple Majors Licenses and the Section III.E Licenses. SoundExchange produced the licenses and royalty reporting statements on November 14, 2014, weeks before the Services noticed depositions, including of Dr. Rubinfeld, and months before the Services submitted their written

<sup>3</sup> Furthermore, Aaron Harrison of Universal, another SoundExchange witness, not only identifies the [REDACTED] he attaches [REDACTED] as an exhibit to his testimony.

rebuttal case. The Services could have questioned Dr. Rubinfeld or other SoundExchange witnesses (including Aaron Harrison of Universal and Dennis Kooker of Sony, each of whose companies had a license with Apple that SoundExchange produced) about those licenses, but made a tactical decision not to do so.

The Services also pressed SoundExchange for even more information—including internal negotiating, performance, and valuation documents—concerning licenses between record companies and 10 digital music services, including Apple’s iTunes Radio and three of the four Section III.E Licenses (Beats Music, Spotify, and Nokia). Choudhury Decl. Ex. 8 (Larson Decl. ISO Motion to Compel SoundExchange to Produce Negotiating Documents, Ex. B). The Judges ultimately ordered SoundExchange to produce some of this requested information, and, in compliance with that order, SoundExchange produced valuation documents concerning the iTunes Radio, Beats Music, Spotify, and Nokia agreements, among others, on January 30. Choudhury Decl. ¶ 5.

#### **IV. SoundExchange Analyzed the Apple Majors Licenses and Section III.E Licenses In Response to the Services’ Written Direct Case**

The Services’ direct case is built around two central claims: first, that licenses for interactive, subscription-based services are improper benchmarks because, according to the Services, those licenses purportedly reflect inflated, supra-competitive prices arising from the alleged “must-have” nature of the major labels’ catalogs for interactive services and from the higher revenue generating subscription-based models of interactive services; and second, that licenses for non-interactive, non-subscription services are the best possible benchmark evidence for statutory services. The Services rely upon a small, select group of licenses involving Pandora and iHeartMedia—each constructed in the shadow of this proceeding—and represent that this is the best evidence of what a willing buyer and willing seller would agree to for a direct license between a record company and a non-interactive, non-subscription service.

In rebutting the Services’ direct testimony, Dr. Rubinfeld, *inter alia*, analyzes in his rebuttal testimony the Apple Warner/Sony Licenses and Section III.E Licenses. As Dr.

Rubinfeld testifies, the market evidence from these licenses for non-interactive, non-subscription services demonstrates the shortcomings of the Services' critique of the interactive benchmarks and the unrepresentative nature of the benchmarks the Services selectively presented. The Services' direct case suggests that non-interactive, non-subscription services would not yield rates comparable to Dr. Rubinfeld's assessment of licenses for interactive, subscription-based services. As explained in greater detail below, Dr. Rubinfeld's testimony clearly proves the Services' suggestion false, as the negotiated rates for the Apple Warner/Sony Licenses and Section III.E Licenses [REDACTED] his proposed rates based on the interactive service set of licenses.

As discussed, SoundExchange included Dr. Rubinfeld's analysis of the Apple Majors Licenses in redacted form in his February 23 rebuttal testimony. SoundExchange followed this same procedure, without objection, in its direct case as a result of confidentiality provisions in [REDACTED]. Once the Judges ordered that confidentiality provisions in such licenses were not grounds to withhold or redact, SoundExchange promptly produced that information.

SoundExchange prepared its rebuttal testimony analyzing the Apple Majors Licenses in redacted form so that, if the Services followed through on their prior assertions about the importance of analyzing or discussing those licenses, SoundExchange could present its expert's analysis of them. The Services had a significant advantage over SoundExchange in this regard, since the restrictions to which the major labels were bound did not in any way bar the Services from providing the Judges with information and analyses about the Apple Majors Licenses.

#### **V. The Services Selectively Relied On the Apple Majors Licenses**

The Services' rebuttal case relies on the terms of one of the Apple Majors Licenses: the license with Warner. Specifically, iHeartMedia witness Todd Kendall stated: "I understand that, in negotiating a direct license with major record labels, iTunes Radio specifically represented to record labels that its service would be substantially promotional in driving iTunes Store

purchases.” Todd Kendall Written Rebuttal Testimony (“Kendall WRT”) 12, ¶ 24. To support this statement, Dr. Kendall cited to an internal Warner document titled [REDACTED]

[REDACTED] with Warner. Choudhury Decl. Ex. 9 (SNDEX0126385). The document specifically discusses [REDACTED]

[REDACTED] Dr. Kendall quoted the following statement from that document: [REDACTED]

[REDACTED] Kendall WRT 12, ¶ 24, n.21. The very same document states, just three pages before the page that Dr. Kendall quoted: [REDACTED] and under that heading states that, as part of the license’s [REDACTED]

[REDACTED] Choudhury Decl. Ex. 9 (SNDEX0126385, at -389). That is because the [REDACTED]

[REDACTED] Choudhury Decl. Ex. 6 [REDACTED] [REDACTED]. Dr. Kendall obviously relied on the terms of the license, even if he selectively chose to quote one page that described the term rather than a preceding page that described the same term under the heading [REDACTED] Other iHeartMedia witnesses also selectively rely upon internal record company documents revealing the rates and terms of Apple’s license with Warner.<sup>4</sup>

## VI. SoundExchange’s Notice of Corrected Testimony

After reviewing hundreds of pages of the Services’ rebuttal testimony, and confirming that the Services had selectively relied on a term of Apple’s license with Warner which the Services considered helpful to their testimony, SoundExchange promptly served notice of the

<sup>4</sup> See, e.g., Fischel/Lichtman WRT at 17, n.51 (quoting as a [REDACTED] document, SNDEX0177335, titled [REDACTED])

[REDACTED] *id.* at 51, n.159 (citing to SNDEX0177710, an [REDACTED] Choudhury Decl. Ex. 10 (SNDEX0177335), Ex. 11 (SNDEX0177710)).

corrected written rebuttal testimony on February 25, just two days after the original filing of Dr. Rubinfeld's written rebuttal testimony.

The Services asked for SoundExchange's basis for correcting its testimony. Choudhury Decl. Exs. 12-14 (Emails from Evan Leo, Todd Larson, and Bruce Joseph). SoundExchange responded with a letter the very next day (February 26), explaining the basis for the removal of Warner's and Sony's contractual bar and noting that the interpretation of the provisions containing the contractual bar is not an issue for the Services but rather an issue between Warner and Apple and Sony and Apple. Choudhury Decl. Ex. 15 (Choudhury Letter).

Though SoundExchange saw no prejudice (and the Services never identified any) in the corrected filing two days after the February 23 original filing, SoundExchange voluntarily offered to extend the Services' discovery deadlines by two days for document requests and interrogatories relating to the Apple Warner/Sony Licenses. *See id.* The Licensee Participants—including all of the moving Services—served 48 of 50 document requests by their regular deadline, and iHeartMedia served two additional requests specific to the Apple Warner/Sony Licenses two days later.<sup>5</sup> Choudhury Decl. Ex. 16 (Licensee Participant Requests for Production), Ex. 17 (iHeartMedia Requests for Production). iHeartMedia claimed that its service of document requests was without prejudice to its position on Dr. Rubinfeld's corrected testimony. *Id.* iHeartMedia has not suggested that its requests be stayed pending the resolution of this Motion. The Services also served an interrogatory directed specifically at the Apple Warner/Sony Licenses, and they have noticed another deposition of Dr. Rubinfeld, where they are free to ask him questions about these licenses.

The Services did not respond to SoundExchange's February 26 letter. Instead, more than 10 days later, the Services filed the instant motion. This Motion also is the first time the Services

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<sup>5</sup> The fact that iHeartMedia alone is listed as serving the two additional requests makes no substantive difference. The Services require SoundExchange to provide discovery sought by one licensee participant to all licensee participants.



have raised any issue with Section III.E of Dr. Rubinfeld's written rebuttal testimony.

### ARGUMENT

#### **I. Rebuttal Testimony Need Only Have a Nexus Or Connection To Issues, Subject Matter, or Shortcomings in a Party's Written Direct Testimony**

The Services purport to divine from the Judges' prior rulings two limitations on rebuttal testimony: (1) that it may not have the effect of "bolstering" a participant's direct case; and (2) that, in the case of benchmark evidence, the rebuttal evidence must directly respond to those benchmark licenses that the opposing party discussed in its written direct submission. Mot. at 12-14. These are rules of the Services' imagination, fashioned in an effort to exclude SoundExchange's discussion of Apple Warner/Sony Licenses and the Section III.E Licenses. They are not the rules delineated and embodied in the Judges' prior rulings.

The actual rule is that rebuttal testimony is permitted if there is a "nexus" or connection between the proffered testimony and the issues, subject matter, or shortcomings in an opponent's direct case.<sup>6</sup> This principle applies even if such testimony bolsters the participant's own direct case;<sup>7</sup> even if the evidence was available to the party at the time of its direct case submission;<sup>8</sup>

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<sup>6</sup> See *Order Granting in Part and Denying in Part Music Choice's Motion to Strike and Denying Motion by Sirius XM to Strike SoundExchange's Designation of Previous Testimony in its Written Rebuttal Statement 2*, Docket No. 2011-1 CRB PSS/Satellite II (August 3, 2012) (denying motion to strike rebuttal testimony because the testimony "attempts to show a nexus" between the testimony and a "*purported shortcoming*" in an opponent's direct testimony); *id.* (denying motion to strike rebuttal testimony where expert testimony responded to "issues raised in the direct testimony of witnesses for the party opposite") (emphasis added)); Choudhury Decl. Ex. 18 (*SDARS II* Rebuttal Hearing Tr. at 3440:6-18 (August 14, 2012) (denying motion to strike rebuttal testimony "arguably responsive to the subject matter" of the opposing party's direct case)).

<sup>7</sup> See Choudhury Decl. Ex. 18 (*SDARS II* Rebuttal Hearing Tr. at 3439:2-4, 3440:6-18 (August 14, 2012) (denying motion to strike rebuttal testimony despite counsel's admission that testimony was "bolstering [participant's] principal benchmark")).

<sup>8</sup> *Order Granting in Part and Denying in Part Music Choice's Motion to Strike and Denying Motion by Sirius XM to Strike SoundExchange's Designation of Previous Testimony in its Written Rebuttal Statement 2*, Docket No. 2011-1 CRB PSS/Satellite II (August 3, 2012) (footnote continued)

and even if the opposing party did not directly discuss the underlying issue in its analysis. Even absent a nexus, the Judges have often exercised their broad discretion to admit proffered rebuttal testimony that completes the record on matters central to the proceeding.<sup>9</sup>

Were the rules as rigid and inflexible as the Services claim, a party could insulate the factual, economic and logical shortcomings in its arguments by omitting to consider matters in its direct case. The party would then claim that the opposing party was barred from pointing out those shortcomings if that party had concrete evidence, whether used or not used in its direct case submission. The Judges have not adopted rules that promote that type of behavior. In *SDARS II*, for example, Music Choice sought to strike portions of Dr. Ford's rebuttal testimony "on the subject of the relationship between relative usage intensity and an appropriate royalty rate." *Order Granting in Part and Denying in Part Music Choice's Motion to Strike and Denying Motion by Sirius XM to Strike SoundExchange's Designation of Previous Testimony in its Written Rebuttal Statement 2 ("Music Choice Order")* (August 3, 2012). According to Music Choice, this testimony was an untimely amendment to Dr. Ford's written direct testimony, which already addressed this topic. *Id.* The Judges, however, concluded that the mere fact that Dr. Ford's direct testimony had already addressed this topic did not "disqualify rebuttal testimony on the same subject where the rebuttal testimony attempts to show a nexus between the subject in question (here, relative usage intensity) and a purported shortcoming in the approach taken by Music Choice's expert witness, Dr. Crawford, in his direct testimony." *Id.*

Counsel for Pandora in this proceeding—the same counsel who represented Sirius XM in *SDARS II*—recognized the clear implication of this decision in a subsequently filed, successful opposition to a motion to strike rebuttal testimony filed by SoundExchange:

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(admitting Dr. Ford's rebuttal testimony on issue of "relative usage intensity" despite coverage of this issue in Dr. Ford's direct testimony).

<sup>9</sup> See, e.g., Choudhury Decl. Ex. 20 (*SDARS I* Hearing Tr. Vol. 17 at 124:8-126:8 (August 15, 2007) ("The grounds of the objection are correct. However the judges exercise discretion on matters that they wish to hear and with that discretion, the objection's overruled.")).

That Sirius XM also included testimony concerning its direct licenses in support of its direct case is of no moment – *the inclusion of evidence during the direct phase should not preclude further testimony on a related subject when it is the legitimate subject of rebuttal*. The Judges acknowledged just this reasoning in their recent [*Music Choice Order*].

Choudhury Decl. Ex. 22 (*Sirius XM's Opposition to SoundExchange's Motion to Strike 2*, Docket No. 2011-1 CRB PSS/Satellite II (August 10, 2012) (emphasis added)). As counsel went on to explain: "Any other rule would lead to the absurd result where no direct-phase witness could reappear on rebuttal to testify on any subject related to his or her initial testimony." *Id.*

The same basic principle applies when a participant presents rebuttal evidence that was previously available to that participant. Whether or not the participant *could* have introduced such evidence sooner, the focus is on the logical relationship between the evidence and the opposing participants' cases. For example, in the *Music Choice Order*, the Judges denied Music Choice's motion to strike Dr. Ford's rebuttal testimony relating to "the subject of the ownership structure of Music Choice." *Music Choice Order 2*. This was despite the fact that Dr. Ford could have provided this testimony in his amended written direct statement. *Id.* The Judges recognized that "notwithstanding the availability of discovered information, an expert witness would have to be blessed with extraordinary prescience to be able to offer *responsive opinions in advance* of the completion of the direct testimony." *Id.* (emphasis in original).

Further, where the participants have offered competing benchmarks, the Judges have recognized that evidence that bolsters or confirms a participant's benchmark is responsive to the "subject matter" of an opponent's direct case, including the proper weight to be given to the agreements underlying the benchmark. *See* Choudhury Decl. Ex. 18 (*SDARS II Rebuttal Hearing Tr.* at 3439:2-4, 3440:6-18 (August 14, 2012)).

In *SDARS II*, SoundExchange moved to strike Professor Noll's testimony on the basis that Professor Noll was simply bolstering his direct testimony by examining several direct licenses with Sirius XM, which offered a benchmark based on such direct licenses. *See* Choudhury Decl. Ex. 18 (*SDARS II Rebuttal Hearing Tr.* at 3425:18 – 3430:6 (August 14,

2012)); *see also* Choudhury Decl. Ex. 23 (*SoundExchange's Motion to Strike Portions of Sirius XM Testimony* 3-4, 11-12 (August 10, 2012)). Despite the fact that SoundExchange's direct testimony had not addressed the appropriateness of relying on Sirius XM's direct licenses, Professor Noll offered additional evidence regarding the advantages of Sirius XM's benchmark and the "representativeness" of the licenses. *See* Choudhury Decl. Ex. 24 (Revised Written Rebuttal Testimony of Roger G. Noll 29-36 (August 12, 2012)). Pandora's counsel in this proceeding, who, as discussed, represented Sirius XM there, admitted candidly that Professor Noll was "bolstering [Sirius XM's] principal benchmark here." In that case, counsel told the Judges that this was "classic rebuttal." Choudhury Decl. Ex. 18 (*SDARS II* Rebuttal Hearing Tr. at 3439:2-4 (August 14, 2012)); *see also* Choudhury Decl. Ex. 22 (*Sirius XM's Opposition to SoundExchange's Motion to Strike* 3, Docket No. 2011-1 CRB PSS/Satellite II (August 10, 2012) ("Sirius XM's testimony regarding its 85 direct licenses" is "a direct rebuttal to SoundExchange's position" which proposes benchmark of "rates paid by interactive streaming services to major record companies")). Ultimately, the Judges *agreed* with Sirius XM's position and found that the testimony was proper rebuttal testimony, as it was "arguably responsive to the subject matter raised in direct testimony by SoundExchange." Choudhury Decl. Ex. 18 (*SDARS II* Rebuttal Hearing Tr. at 3440:6-18 (August 14, 2012)).

The Services also suggest that the introduction of benchmark evidence that was not discussed in any parties' direct testimony is improper except in the case of agreements concluded *after* the submission of direct testimony. Mot. at 23 & n.12. The Judges' Order denying the Services' Motion for Subpoenas in this proceeding flatly refutes that notion. The Judges there clearly contemplated that benchmark evidence not discussed in any party's direct testimony could nonetheless be utilized in rebuttal. The Judges noted that participants "may seek in discovery potential benchmark contract information that opposing" participants "possessed but chose not to include in [their] own benchmark analysis," and the participants "would have sufficient time to incorporate and utilize the new information and documents in their respective rebuttal cases." *Order Denying Subpoena Motions* 4-5.

Finally, on numerous occasions, even where the Judges have concluded that a participant's testimony is not proper rebuttal testimony, the Judges have exercised their broad discretion to admit such testimony. For example, in *SDARS I*, the Judges sustained an objection that a witness's testimony was "rebuttal of rebuttal," yet exercised their discretion to permit the testimony. Choudhury Decl. Ex. 20 (*SDARS I* Hearing Tr. Vol. 17 at 124:8-126:8 (August 15, 2007)) ("The grounds of the objection are correct. However the judges exercise discretion on matters that they wish to hear and with that discretion, the objection's overruled.")). Similarly, the Judges exercised their discretion to deny a motion to strike the rebuttal testimony of Dr. Woodbury, a witness for the services in *SDARS I*, despite the fact that the Judges concluded that "Dr. Woodbury's written rebuttal statement is not consistent with the standards of rebuttal testimony." Choudhury Decl. Ex. 21 (*SDARS I* Hearing Tr. Vol. 22 at 19:18-20:6 (August 23, 2007)).<sup>10</sup> And in *SDARS II*, the Judges exercised their discretion to permit rebuttal testimony from a Sirius XM witness because the testimony related to a "central aspect" of Sirius XM's case. Choudhury Decl. Ex. 19 (*SDARS II* Rebuttal Hearing Tr. at 3677:10 – 3678:4 (August 15, 2012)). As Pandora's counsel here successfully argued in *SDARS II* (when appearing for Sirius XM): "the notion that there shouldn't be a full record developed on what is our core benchmark in this case let alone the ability of our principal economist to respond to challenges in the representativeness [of that benchmark] would seem to undermine the very purpose of these proceedings, which is once and for all, we get a coalition joinder on the core economic theories of the parties." Choudhury Decl. Ex. 18 (*SDARS II* Hearing Tr. at 3431:6-22 (August 14, 2012)). The Judges agreed and permitted the rebuttal testimony.

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<sup>10</sup> The Services cite SoundExchange's arguments relating to Dr. Woodbury's testimony as an example of SoundExchange "successfully advocating" for the same artificial limits on rebuttal testimony now proposed by the Services. Mot. at 12-13. The Services omit to tell the Judges that SoundExchange's motion was *denied*. Choudhury Decl. Ex. 21 (*SDARS I* Hearing Tr. Vol. 22 at 19:18-20:6 (August 23, 2007)).

## **II. Dr. Rubinfeld's Testimony Is Proper Rebuttal Testimony**

The testimony the Services seek to strike from Dr. Rubinfeld's rebuttal testimony concerning the Apple Warner/Sony Licenses and Section III.E Licenses is directly, indeed, critically responsive to the heart of the Services' direct case—it refutes the Services' critiques of the interactive services benchmarks and demonstrates that their own non-interactive benchmarks are based on unrepresentative licenses. Under the standards set forth by the Judges, Dr. Rubinfeld's testimony is plainly proper rebuttal.

### **A. Dr. Rubinfeld's Rebuttal Testimony Is Directly Responsive to the Services' Direct Case**

#### **1. In Their Direct Testimony, The Services Critique Interactive Service Benchmarks And Contend That Licenses for Non-Interactive, Non-Subscription Services Are The Best Benchmark Evidence**

The Services' direct case is built around two core claims: (1) that interactive service licenses suffer from a number of defects that make them improper benchmarks; and (2) that licenses for non-interactive, non-subscription services are the most informative benchmark evidence. These points are repeatedly made through the written direct testimony of each of the Services' key economic experts.

A central line of criticism from the Services is that the licensing market for interactive services is not “workably” or “effectively” competitive and thus the negotiated rates for these services are above “competitive levels.” According to this critique, because the catalogs of major record companies might be “complements” rather than “substitutes,” *i.e.*, interactive services “must have” the repertoire of all of the major labels, this allegedly gives each major label disproportionate bargaining power that allows it to charge supra-competitive prices for its catalog. By contrast, because non-interactive services have the ability to “steer” the mix of sound recordings played on their services, the catalogs of the major labels are not “must-haves.” For this reason, the Services argue, a rate based on the interactive service market would be inflated and improper.

For example, Pandora's expert, Dr. Carl Shapiro, testifies in his written direct testimony:

- “If interactive streaming services indeed ‘must carry’ the music from each of several major record companies to be competitive, and if these services have a limited ability to control the mix of music played by their customers because customers pick which songs to listen to, the market for recorded music licensed to interactive streaming services is *not* workably competitive.” Shapiro WDT at 12.
- The “ability or inability of a webcaster to steer listeners toward or away from the music of a given record company is fundamental to the licensing negotiations that would take place in the absence of a compulsory license.” *Id.* at 9.
- The “ability to steer is likely far greater for a noninteractive service – one that selects the performances – than it is for an interactive service – one that has little control over the selected performances. In such circumstances, the elasticity of demand of the non-interactive service would be far greater than the elasticity of demand of the interactive service.” *Id.* at 19.
- “My observation that the market for recorded music used by interactive services appears not to be workably competitive warns strongly against using royalty rates from that market as benchmarks for the current proceeding, unless a market power adjustment (among other adjustments) is made.” *Id.* at 13.<sup>11</sup>

Similarly, NAB’s expert, Dr. Michael Katz, testifies in his written direct testimony:

- “[W]hen the major record companies sell licenses to interactive webcasting services, the majors are selling complementary products. Consequently, the prices they individually extract will exceed even the monopoly price. It follows *a fortiori* that these are not effectively competitive prices and, therefore, are not appropriate benchmarks for the prices to which a willing buyer and willing seller would agree in an effectively competitive market.” Katz WDT at 34 (emphasis added).
- “Interactive services have less ability to shift share among labels than do noninteractive services, including simulcasters. Hence, even for contracts that are

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<sup>11</sup> Dr. Shapiro further notes in his written direct testimony that he saw “no reason why the hypothetical statutory market would be entirely free of price discrimination, since different webcasters may have significantly different abilities to steer listeners toward or away from the repertoires of individual record companies,” but at “this point in the proceeding, I do not have access to a sufficient number of licensing agreements between record companies and webcasters to determine directly, i.e., based on price differences, whether price discrimination is a significant feature of this market.” Shapiro WDT at 17. As noted, although SoundExchange produced to Pandora several licenses between record labels and non-interactive services following the submission of the direct testimony, including the Apple Majors Licenses and Section III.E Licenses, Dr. Shapiro did not analyze such licenses in his rebuttal testimony.

not with majors, interactive license fees will be higher than those that would obtain under conditions of effective competition.” Katz WDT at 42.

Another line of criticism the Services advance is that because interactive services are primarily subscription-based services, they have substantially higher ARPUs than non-interactive services, which are primarily ad-supported. Under this view, the license rates paid by interactive subscription-based services would be substantially higher than those paid by non-interactive, non-subscription services.

As Dr. Katz testifies in his written direct testimony:

- “Nonsubscription, noninteractive services have adopted a fundamentally different business model than have the subscription, interactive services and even subscription, noninteractive services; nonsubscription services rely on advertising revenue rather than revenue collected from listeners. The differences in the ways the services generate revenues (*e.g.*, whether the listener is charged or not) can be expected to result in the suppliers of these different services facing different demand curves, with different demand elasticities. These differences would, in turn, affect the service providers’ derived demand for music licenses.” Katz WDT at 35-36.
- “Consequently, economic theory indicates that the royalty rates paid by subscription-based services in an effectively competitive market could differ substantially from those paid by nonsubscription services in an effectively competitive market. Given the different characteristics of the services (*e.g.*, the degree to which consumers can choose the songs to which they listen), economic theory indicates that the differences between royalty rates for subscription-based, interactive services and nonsubscription, noninteractive services could be particularly large.” *Id.* at 36.

Similarly, iHeartMedia’s experts, Professors Daniel Fischel and Douglas Lichtman, testify that the interactivity adjustment that SoundExchange previously has applied to interactive rates based on retail subscription prices overstates the rates as applied to non-interactive, non-subscription services:

- “[O]ne of Dr. Pelcovits’ main adjustments relies on subscription prices for interactive and non-interactive services. Because subscribers typically generate more revenue per listener than non-subscribers, this approach likely overstates the revenue-generating ability of non-interactive webcasters, and hence, the royalty rates they would pay.” Fischel/Lichtman WDT at 57-58.

The Services conclude that in light of these purported deficiencies of the interactive benchmark, the best, most informative benchmark agreements would be from non-interactive,



non-subscription services. The Services do not, however, in their direct or rebuttal testimony ever present the Apple Majors Licenses or the Section III.E Licenses—licenses for the most relevant non-interactive, non-subscription services—as potential benchmarks. Instead, they select a number of less relevant licenses that they undeniably executed with a mind toward influencing these proceedings: the Pandora-Merlin deal and the iHeartMedia-Warner deal (along with various agreements between iHeartMedia and independent labels).

As Pandora claims in its introductory memorandum in the written direct case, “[i]n past webcaster proceedings, the Judges have been presented with imperfect surrogates lacking in comparability to the statutory services at issue. These inapposite benchmarks have included so-called ‘interactive’ services,” and that “[a]gainst this backdrop, Pandora’s written direct statement presents the Judges with evidence of a kind not presented in the *Web II* or *Web III* proceedings: a competitive, arm’s length direct license agreement between Pandora and a significant number of record companies [Merlin] for the very rights – public performances of sound recordings on noninteractive Internet radio and ephemeral copies made in aid of such performances – as are covered by the statutory license.” Pandora Intro. Memo. at 2-3. Similarly, Dr. Shapiro testifies after criticizing the purportedly “complex adjustments” applied to interactive agreements, that “[f]ortunately . . . in this case we have a benchmark agreement [Pandora-Merlin] that is identical or nearly identical along nearly all of the relevant dimensions to the hypothetical transaction at issue in this proceeding.” Shapiro WDT at 20. Similarly, in critiquing the “interactivity adjustment” that SoundExchange relied upon in earlier proceedings based on retail subscription prices, Dr. Katz testifies that “it would have been preferable to examine the actual revenues of nonsubscription, noninteractive services.” Katz WDT at 68, ¶ 107.

Likewise, Professors Fischel and Lichtman testify that the direct deals between iHeartMedia and Warner and various other independent labels, “are in our opinion the best currently available evidence on the rates and terms that a willing buyer and willing seller would negotiate,” as they “were in fact negotiated by buyers and sellers for rights we understand are

very similar to those at issue in this proceeding,” and that, by contrast, the interactive service benchmarks “likely overstate[] the royalty that a willing buyer and seller would negotiate.” Fischel/Lichtman WDT at ¶¶ 18, 24.

**2. The Testimony of Dr. Rubinfeld The Services Seek to Strike Is Directly Responsive To Their Direct Testimony**

In response to the Services’ direct testimony, Dr. Rubinfeld’s rebuttal testimony analyzes a number of licenses between the major and independent record labels and primarily non-interactive and/or non-subscription services—including licenses for Apple’s iTunes Radio, Beats Music’s “The Sentence,” Spotify’s free tier, Rhapsody’s unRadio, and Nokia MixRadio. Dr. Rubinfeld’s testimony is squarely proper rebuttal testimony as it directly analyzes and responds to the shortcomings in the Services’ direct case through the use of alternative, critical benchmark evidence that the Services themselves have inexplicably disregarded. *See SDARS II* Rebuttal Hearing Tr. at 3439: 2-4, 3440: 6-18 (August 14, 2012) (concluding in a case where participants offered competing benchmarks that evidence that bolstered a participant’s benchmark was responsive to “subject matter” of opponent’s direct case and thus admissible as rebuttal evidence); *Music Choice Order* at 2 (rebuttal proper where it “attempts to show a nexus between the subject in question” and “a purported shortcoming in the approach taken by” opponent’s expert “in his direct testimony.”).

Dr. Rubinfeld’s testimony is proper rebuttal for at least three reasons.

*First*, the testimony tests and proves false the Services’ core argument that the interactive benchmark (and in turn SoundExchange’s rate proposal) are somehow overstated and exceed the rates that a willing buyer/willing seller would agree to for non-interactive, non-subscription services. If it were true that the rates of interactive, subscription-based benchmarks, as adjusted for interactivity, are improperly inflated, then under the Services’ argument, the negotiated rates for the non-interactive, non-subscription services Dr. Rubinfeld analyzes should be substantially lower. But that is not the case. In fact, such rates [REDACTED] Dr. Rubinfeld’s proposed rates based on the interactive service set of licenses. That the Services’ experts did not

test their theories against *all* relevant market evidence highlights the shortcomings of their analysis.

*Second*, Dr. Rubinfeld's testimony analyzes benchmark evidence that directly meets the Services' espoused gold-standard benchmark of non-interactive, non-subscription licenses. It is entirely proper for Dr. Rubinfeld on rebuttal to analyze a core set of benchmark agreements that meet the Services' own criteria, and which they have disregarded in their own testimony.

*Third*, Dr. Rubinfeld's discussion of these licenses demonstrates that there are market rates negotiated for non-interactive, non-subscription services that are substantially higher than the agreements Pandora (the Pandora-Merlin license) and iHeartMedia (the iHeartMedia-Warner license) have touted as their primary benchmarks in their direct cases. Dr. Rubinfeld's testimony demonstrates that the Services' own non-interactive benchmarks are based on an unrepresentative set of licenses.

**(a) The Apple Warner/Sony Licenses**

In Appendix 2 of his rebuttal testimony, Dr. Rubinfeld describes and analyzes Apple's licenses for its non-interactive iTunes Radio service with Warner and Sony.<sup>12</sup> In 2013, Apple entered into [REDACTED] licenses with each of the three major record companies for its iTunes Radio service. Apple's service is substantially similar to non-interactive services operating under the statutory license; [REDACTED]

[REDACTED]<sup>13</sup> iTunes Radio has featured stations and allows users to

<sup>12</sup>

[REDACTED] Nothing, however, has restricted the Services from submitting the agreement or analyzing it in support of their claimed desire to present the Judges with evidence of marketplace agreements between the record labels and non-interactive services. It is completely disingenuous for the Services to suggest that *SoundExchange* has been selective in the information it has presented to the Judges (Mot. at 9 n.3).

<sup>13</sup>

create their own stations based on artists, songs or genres. When a song is playing, listeners can ask the service to play similar songs or not to play the song again. Apple's service does not have interactive, "on-demand" functionality, i.e., it does not allow a user to choose and listen to any particular sound recording.

Because, just like Pandora and other non-interactive services, iTunes Radio is not an "on-demand" service, it therefore equally has the ability to steer listeners to music offered by different labels, including independents. Thus, under the Services' argument, the catalogs of the major labels are not "must-haves" for Apple. In addition, Apple occupies a unique position in the marketplace and possesses significant bargaining power in its negotiations with record labels. The Apple Warner/Sony Licenses can hardly be construed as instances where the labels had all or most of the bargaining power. Moreover, like other non-interactive services, iTunes Radio is primarily an ad-supported service and not (acknowledging some revenue from "iTunes Match" subscribers)<sup>14</sup> a subscription-based service. Accordingly, there would be little if any differential in ARPUs between iTunes Radio and other non-interactive services.

Finally, unlike the benchmarks proposed by Pandora and iHeartMedia, which were expressly negotiated with a mind toward influencing these proceedings, the Apple Warner/Sony Licenses were never contemplated to be the centerpiece of any party's case in the CRB. As noted, the agreements [REDACTED] they were negotiated well before the commencement of this proceeding, and Apple has decided not to participate in this proceeding.

With respect to the Apple's license with Warner, Dr. Rubinfeld calculates a per-play rate starting at [REDACTED] and for Apple's license with Sony, he calculates a per-play rate starting at [REDACTED] Rubinfeld WRT, Appendix 2, at 10, 13. This compares with Dr. Rubinfeld's rate proposal, based on the interactive service agreements, commencing at \$.0025 in 2016.

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<sup>14</sup> Subscribers to iTunes Match receive an ad-free listening experience.

**(b) Section III.E Licenses**

The Services also seek to strike Section III.E of Dr. Rubinfeld's rebuttal testimony regarding several recent licensing agreements for non-interactive and/or non-subscription services that further rebut and undermine the Services' direct testimony. The Section III.E Licenses likewise have rates that [REDACTED] those of Dr. Rubinfeld's rate proposal, further refuting the Services' critique of the interactive service set of benchmarks. This testimony was not redacted in SoundExchange's original Written Rebuttal Statement (submitted February 23), and, as discussed above, these licenses were presented in SoundExchange's direct case. Several of these services are standalone offerings of services that Dr. Rubinfeld analyzed in his direct testimony (Beats Music, Spotify, Rhapsody), or are offered as separate services (Nokia MixRadio). Further, SoundExchange witness Darius Van Armen discussed in his written direct testimony the Rhapsody "unRadio" service, and attached the term sheet to his testimony.

**(i) Beats Music's "The Sentence"**

As described in Dr. Rubinfeld's rebuttal testimony, while Beats Music principally is an interactive subscription offering, Beats Music announced at the time of launch in January 2014 that it would offer a free non-interactive feature referred to as "The Sentence." "The Sentence" provides consumers the opportunity to enter a location, mood, setting, and genre and then listen to music curated by the service; the user cannot choose a particular sound recording. Users also cannot utilize off-line or cached content, and content cannot be rewound for repeat playback by the user. Thus, as with Pandora, Apple's iTunes Radio, and other primarily non-interactive services, "The Sentence" is not an "on-demand" service, and under the Services' argument, it equally has the ability to steer listeners to music offered by different labels, including independents. Indeed, given that stations and channels of "The Sentence" are based purely on mood, Beats Music would have even greater ability to steer than a service like Pandora, which allows listeners to create stations based on particular artists or sound recordings. "The Sentence" is thus effectively a non-interactive, non-subscription service involving functionality that is

closely comparable to other statutory services. The agreements between Beats Music and the record companies, [REDACTED]

The rates for "The Sentence" that Dr. Rubinfeld has analyzed are expressly applicable to the free offering, and contemplate [REDACTED]

[REDACTED] Given that the statutory license does not require a commitment by a statutory licensee to offer a higher ARPU subscription offering, Dr. Rubinfeld has analyzed the rates that would apply when there is no or little conversion. [REDACTED]

[REDACTED], the stated rates agreed to between Beats Music and Universal, Warner, and Sony, [REDACTED] range from [REDACTED] per play in 2014, as compared to Dr. Rubinfeld's rate proposal which again would start at \$.0025 in 2016. Rubinfeld WRT at 39, ¶ 162.

#### (ii) Spotify Free Tier Service

As described in Dr. Rubinfeld's rebuttal testimony, Spotify offers, in addition to its subscription-based service offering, a free, ad-supported service. The vast majority of Spotify's active users (approximately 75%) use only the free ad-supported service. Spotify's free ad-supported service is available on mobile phones, tablets, and desktop computers. The free service on mobile phones, released in December 2013, does not have full on-demand functionality. Instead, it offers a "Shuffle" service, which does not allow users to pick particular sound recordings (except in limited instances), but does allow them to hear, for example, a limited number of sound recordings from an artist's album on a "randomized" basis; it also restricts the number of skips to six per hour. Thus, like non-interactive statutory services, Spotify's free tier has certain similar restrictions, and is a free ad-supported service. Industry commentators have described the Spotify free mobile service as offering functionality similar to

that offered by non-interactive services like Pandora.<sup>15</sup>

As described in Dr. Rubinfeld's testimony, the stated per-play rate applicable to plays on Spotify's free ad-supported service for [REDACTED], as compared to Dr. Rubinfeld's proposal of \$.0025 for 2016. Rubinfeld WRT at 39, ¶ 163. Moreover, in his rebuttal testimony, Section III.B, Dr. Rubinfeld analyzes the ARPUs of interactive ad-supported services like the Spotify free tier and ad-supported, primarily non-interactive services like Pandora, and concludes that the ratio between the two is approximately 1:1, meaning that no further adjustment based on revenue would need to be made to Spotify's free service rate when comparing it to similar ad-supported, non-interactive services.

### (iii) Rhapsody unRadio

Dr. Rubinfeld also analyzes Rhapsody's unRadio product, which was introduced in June 2014. unRadio is a mobile and web-based non-interactive streaming service that offers personalized radio based on users' favorite artists or tracks, with unlimited skips. In terms of functionality, it is closely similar to customizable services like Pandora. unRadio is therefore a primarily non-interactive service with the same purported ability to steer listeners as Pandora and other primarily non-interactive services. Rhapsody offers a 14-day free trial for the service, followed by a subscription price of \$4.99 per month.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Rubinfeld WRT at 47, ¶ 197.

<sup>15</sup> <http://readwrite.com/2013/12/11/spotify-free-shuffle-mobile-play-android-ios> (noting that "Spotify Shuffle for free on mobile devices is akin to other music streaming apps like Pandora or Rdio."); <http://blog.zagg.com/faceoff-spotify-vs-pandora/> ("The mobile app for Spotify is very similar to Pandora if you are using the Free Membership.")

**(iv) MixRadio (Nokia)**

Finally in Section III.E, Dr. Rubinfeld analyzes the Nokia free-to-consumer radio service, MixRadio, which he also analyzed in his direct testimony. MixRadio is not an “on-demand” service and therefore equally has the ability to steer listeners to particular sound recordings under the Services’ logic. It also is a non-subscription, free service.<sup>16</sup> The service is near-DMCA compliant, except that it permits users to play cached radio stations via Nokia devices while offline.

As Dr. Rubinfeld testifies, Nokia has licenses with [REDACTED]

[REDACTED] the rate of \$.0025 in Dr. Rubinfeld’s rate proposal for 2016. Rubinfeld WRT at 48, ¶¶ 200-01.

**B. Dr. Rubinfeld’s Testimony Regarding the Apple Warner/Sony Licenses Is Not “Sur-rebuttal” Evidence**

The Services make a half-hearted claim that Dr. Rubinfeld’s testimony regarding the Apple Warner/Sony Licenses is actually a “sur-rebuttal” because it was “motivated” by certain statements in the Services’ rebuttal case that rely upon terms of the Apple Majors Licenses. Mot. at 14. This claim is misleading and wrong. It confuses the statements in the Services’ rebuttal case that [REDACTED]

[REDACTED] thereby permitting Warner and Sony to submit them to the Judges, and the Services’ direct testimony that Dr. Rubinfeld is substantively responding to in his discussion and analysis of the Apple Warner/Sony Licenses. And of course, it would have been chronologically

<sup>16</sup> MixRadio also has a premium service offering for \$3.99 a month that provides unlimited track-skipping, unlimited offline mixes, and high-quality audio, and which is also available on PCs.



impossible for Dr. Rubinfeld's rebuttal testimony to be "motivated" by statements he had not yet even seen until after his testimony was submitted.

Moreover, the Services do not, and cannot, argue that Dr. Rubinfeld's testimony was drafted or in any way altered *in response* to the Services' rebuttal case—and it unequivocally was not. As the Services acknowledge, SoundExchange could not submit testimony on Apple Warner/Sony Licenses prior to the Services' reliance upon these agreements in rebuttal. Mot. at 18. SoundExchange submitted the testimony in redacted form on February 23, and it filed a corrected, unredacted version a mere 48 hours later after it confirmed that the exemption to the provision restricting use of the licenses was triggered by the Services' rebuttal case.

Finally, the Services' suggestion that the statements by iHeartMedia's expert, Dr. Todd Kendall, regarding Apple's license with Warner did not sufficiently consider or "rely" upon the agreements to [REDACTED] (Mot. at 20-21) is both irrelevant and, in any event, wrong. As the Services recognize, whether "Sony and Warner may finally have been permitted to disclose their Apple agreements" is "an issue between them and Apple," not the Services, and not the CRB. Mot. at 19. The Judges expressed a similar view in ordering the production of licenses to proceeding participants, notwithstanding the existence of confidentiality provisions in such agreements and their potential breach, noting that the parties' "recourse, if any, is to seek an appropriate remedy under the respective contractual provisions in a court of competent jurisdiction."<sup>17</sup>

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<sup>17</sup> October 30, 2014 Order Granting Services' Joint Motion to Compel SoundExchange to Produce License Agreements and Other Documents Withheld on Confidentiality Grounds at 2 (the "Judges acknowledge Beats' allegations that SoundExchange and the record companies it represents have already violated confidentiality agreements in the license agreements between Beats and the record companies. Nevertheless, even if true, these allegations have no bearing on the discoverability of the documents in this proceeding. Beats' recourse, if any, is to seek an (footnote continued)

And in any event, the exemption to the restrictions in the Apple Warner/Sony Licenses regarding their use was clearly satisfied. Contrary to the Services' misreading of the Warner document at issue, Dr. Kendall cites and quotes from a Warner document prepared *post-execution* of Apple's license with Warner that summarizes the [REDACTED] of Apple's license with Warner, including that [REDACTED] [REDACTED] (SNDEX0126389)— which is the very deal term that Dr. Kendall quotes in his testimony (*see* Kendal WRT at n.21). This was not, as the Services misleadingly state, "a comment that passed between the parties during negotiations before the execution of that agreement" (Mot. at 11); in fact, as the Warner document states, it was a [REDACTED]

[REDACTED] 18

**C. The Services Themselves Have Submitted Substantial New Evidence, Including New Benchmark Evidence, on Rebuttal**

Not only is the Services' position inconsistent with the Judges' prior rulings and common sense, it is at odds with their own conduct on rebuttal, in which they have submitted substantial new evidence, including benchmark evidence, to "bolster" their own cases.

For example, Pandora has submitted a new license with the classic music label Naxos as a benchmark, which Dr. Shapiro analyzes in his rebuttal testimony utilizing the "same approach" he applied to Pandora's license with Merlin. Shapiro WRT at 37. Without mentioning Naxos,

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appropriate remedy under the respective contractual provisions in a court of competent jurisdiction.").

<sup>18</sup> Professors Fischel and Lichtman similarly rely on an internal Warner document reflecting the negotiation of Apple's license with Warner to bolster their argument that non-interactive webcasters are promotional. (*See* Fischel/Lichtman WRT ¶ 31 n.51 (citing Warner's [REDACTED])).

the Services implicitly acknowledge this inconsistency in their Motion, arguing that a narrow exception exists for “agreements of the same kind as those presented in the direct testimony executed *after* submission of the direct testimony.” Mot. at 23 n.12. But as shown above, the Judges have not adopted any such rule and have clearly stated that the submission of new evidence on rebuttal, even where previously available to the submitting party, may be proper rebuttal. *Music Choice Order 2; Order Denying Subpoena Motions 4-5*.

Similarly, in their rebuttal testimony, Professors Fischel and Lichtman also offer substantial new evidence to bolster and confirm their benchmarks, including the following:

- They conduct a “natural experiment” looking at the Pandora hourly listening cap to confirm that iHeartMedia’s direct license with Warner is a proper benchmark. Fischel/Lichtman WRT at ¶¶ 16-20, 48, Exs. A-D.
- They discuss the impact that concert revenue promotion would have on non-interactive rates. This discussion does not respond to any claim that Dr. Rubinfeld (or any other witness) makes related to promotion/substitution. *Id.* ¶ 27.
- They discuss a musical works benchmark, again available to them at the time of direct testimony submission, as an adjustment to the proposed rates. *Id.* ¶¶ 78-81.
- They discuss monthly interest rate benchmarks, which were available at the time of direct but not previously mentioned as evidence supporting their benchmark. *Id.* ¶¶ 117-121.

### **III. The Services Have Not Been Prejudiced by SoundExchange’s Timely Submission of Dr. Rubinfeld’s Corrected Testimony**

SoundExchange timely submitted Dr. Rubinfeld’s testimony on February 23, and it corrected his testimony as promptly as possible under the circumstances—a mere 48 hours after its original submission. It strains credulity to suggest that the Judges’ consideration of highly relevant evidence that has long been in the Services’ possession could be prejudicial.

SoundExchange submitted the challenged testimony to the CRB in a timely, prompt manner. SoundExchange included the Apple Warner/Sony Licenses in its rebuttal testimony because they contain highly informative market evidence, and they were directly responsive to the Services’ critiques of the interactive benchmark. At the same time, however, when it filed its

rebuttal case, SoundExchange had no way of knowing whether the Services would rely on any of the Apple Majors Licenses, thereby potentially rendering [REDACTED]

[REDACTED] Thus, the only way for SoundExchange to present this important evidence to the Judges in a timely manner without compromising its members' contractual obligations was under a provisional redaction.

Nothing here has prejudiced the Services. As noted, the Services themselves sought the Apple Majors Licenses last spring in their subpoena motions. And SoundExchange's belief that these licenses should be considered in this proceeding has been clear since it filed its direct case. Mot. at 5-6. SoundExchange produced these licenses to the Services in November, and they have had them at their disposal for months. Unlike SoundExchange, the Services had nothing preventing them from submitting the Apple Majors Licenses for the Judges' consideration. And the Services had ample opportunity to amend their direct testimony to do so, or to address the licenses in rebuttal. They simply *chose* not to. The Services also were not constrained from inquiring about the licenses during their direct-phase depositions of SoundExchange witnesses, including Dr. Rubinfeld and witnesses from Universal and Sony, each of whom had a license with Apple produced by SoundExchange. Again, that they failed to do so in no way demonstrates prejudice. Their silence instead suggests that the Services, being aware of the [REDACTED] that prevented SoundExchange from introducing them and after becoming aware that the licenses were damaging to the Services' rate proposals, were hoping that they could ignore away this evidence. And indeed, the Services did seek—and received—additional discovery related to the licenses.<sup>19</sup> Had they truly believed there was “no reason” to investigate these agreements in discovery (Mot. at 21), they should not have asked SoundExchange to expend considerable resources collecting, reviewing, and producing internal record label documents relating to the licenses.

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<sup>19</sup> See Choudhury Decl. Ex. 8 (Ex. B to Motion to Compel Negotiating Documents (email from Pandora counsel seeking negotiating documents and reports of use related to iTunes Radio)).

In fact, the Services' rebuttal testimony demonstrates that they *did* review the Apple Majors Licenses, as well as the related internal label documents that SoundExchange produced. The Services strategically waited until their rebuttal filing to make selective mention of the licenses, such as in Dr. Kendall's testimony. That the Services' reliance on the Apple Majors Licenses was selective is no surprise given, as shown above, that the Apple Warner/Sony Licenses indicate a willing buyer/willing seller rate that is [REDACTED] their proposals.

To the extent the Services' experts chose to forego a more in-depth analysis of this highly relevant benchmark evidence that has been in their possession for months, such an omission simply reflects the cherry-picked nature of the Services' benchmark analysis. That the Services opted to selectively ignore this evidence demonstrates little more than the myopic and highly strategic nature of their benchmark analysis. The Services were doing exactly what Pandora said it was concerned that SoundExchange might do, *i.e.*, "make judgments as to those [licenses] that optimize its case . . . while effectively 'burying' the rest." Choudhury Decl. Ex. 1 (Pandora Subpoena Motion 13).

The Services' suggestion that they have been prejudiced in their rebuttal-phase discovery is even more strained. In its February 26 letter, SoundExchange offered the Services an additional two days to serve document requests and interrogatories related to Dr. Rubinfeld's corrected testimony. Perelman Decl. Ex. 5 at 3. iHeartMedia took SoundExchange up on this offer by serving supplemental document requests two days after the deadline, and, as noted, the discovery produced in response to these requests will go to all of the Services. *See* Supplemental Rebuttal-Phase Document Requests to SoundExchange, Inc. from iHeartMedia, Inc. Accordingly, not only have the Services already had ample opportunity to analyze the Apple Majors Licenses, they had additional time to consider Dr. Rubinfeld's analysis of the Apple Warner/Sony Licenses before serving discovery requests—the same amount of time SoundExchange had to consider the evidence proffered by the Services in rebuttal before serving its requests. And the Services have noticed another deposition of Dr. Rubinfeld, where they can

ask him questions about his analysis of the Apple Warner/Sony Licenses.

In short, the Services have suffered no prejudice as a result of Dr. Rubinfeld's corrected testimony, which prejudice, in any event, would be entirely self-inflicted. While consideration of this evidence prejudices no party, striking it would undermine the Judges' ability to set rates that accurately reflect the market.

#### **IV. Even if The Testimony Were Improper Rebuttal or Untimely, The Judges Should Exercise Their Discretion To Consider It**

As noted, even where the Judges have concluded that a participant's rebuttal testimony may not be procedurally proper, they have exercised their broad discretion to admit such testimony. Although Dr. Rubinfeld's testimony is both proper rebuttal and was submitted in a timely manner, even if it were not, the case for admitting such testimony under the Judges' discretion is especially compelling given that the testimony is critical benchmark evidence that is crucial to understanding the "thick market" of streaming services.<sup>20</sup>

Prior to filing this Motion and prior to having reviewed the Apple Majors Licenses, the Services themselves aggressively asserted this very position. In Pandora's subpoena motion, in which it referenced information concerning "agreements between Apple and various record companies for its iTunes Radio service," it emphasized the "fundamental importance" of "marketplace evidence" to "the rate-setting process" and the "importance of developing a more comprehensive record in aid of an optimal determination." Choudhury Decl. Ex. 1 (Pandora Subpoena Mot. at 3, 7, 12). Similarly, NAB, in its joinder to Pandora's motion, observed that "[g]iven Apple's prominence and size, the services (including their economic experts) should have the opportunity to review such agreements and address them in their affirmative cases," that consideration of these licenses by the Judges would foster "*a fairer and more balanced evidentiary record*," and that the "centrality" of these agreements to the proceeding was "self-evident." Choudhury Decl. Ex. 4 (NAB Subpoena Motion 9) (emphasis added), Ex. 5 (NAB

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<sup>20</sup> *Order Denying Subpoena Motion 5.*

Reply ISO Subpoena Motion 2). And in denying Pandora and NAB's Subpoena Motions without prejudice, the Judges themselves recognized "that the information sought by Pandora and NAB could be central to the resolution of this proceeding." *Order Denying Subpoena Motions* 5.

Regardless of whether the testimony constitutes proper rebuttal, the Judge should deny the Services' motion because the testimony is clearly of central importance to these proceedings. *See, e.g.*, Choudhury Decl. Ex. 19 (*SDARS II* Rebuttal Hearing Tr. at 3677:10 – 3678:4 (August 15, 2012) (considering evidence that was a "central aspect" of Sirius XM's case, even if not proper rebuttal)). As Pandora's counsel here successfully argued in *SDARS II* on behalf of Sirius XM, "the notion that there shouldn't be a full record developed" would "seem to undermine the very purpose of these proceedings, which is once and for all, we get a coalition joinder on the core economic theories of the parties." Choudhury Decl. Ex. 18 (*SDARS II* Hearing Tr. at 3431:6-22 (August 14, 2012)). The Judges agreed and permitted the rebuttal testimony there, and for this, and all of the other reasons set forth above, they should do the same here as well.

### CONCLUSION

SoundExchange respectfully requests that the Judges deny the Licensee Services' Motion to Strike SoundExchange's Corrected Written Rebuttal Testimony of Daniel Rubinfeld and Section III.E of the Written Rebuttal Testimony of Daniel Rubinfeld.

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Respectfully submitted,

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